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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

HONG HUNG,

Defendant and Appellant.

B232356

(Los Angeles County  
Super. Ct. No. GA079864)

APPEAL from a judgment of the Superior Court of Los Angeles County. Teri Schwartz, Judge. Affirmed.

Jessica Coffin Butterick, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Hong Hung appeals from a judgment entered after a jury convicted him of mayhem (Pen. Code, § 203, count 1)<sup>1</sup> and assault by means likely to produce great bodily injury (§ 245, subd. (a)(1), count 2). As to count 2, the jury found to be true the special allegation that appellant personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (a). The trial court sentenced appellant to four years in state prison selecting the midterm on the mayhem conviction. The court imposed the upper term of four years for the assault and stayed the sentence pursuant to section 654. The court struck the punishment for the great bodily injury enhancement (§ 12022.7, subd. (a)).

Appellant contends (1) the trial court erred in excluding evidence that the victim's friends threatened appellant, (2) the trial court should have, sua sponte, instructed the jury that it could consider evidence of prior threats by the victim and his friends when evaluating the reasonableness of appellant's claim of self-defense, and (3) cumulative prejudice resulting from the claimed errors requires reversal. Finding no error, we affirm the trial court's ruling.

## **FACTS**

### **Prosecution Evidence**

Appellant and Anh Hoa Bang were both homeless and lived on the streets of Monterey Park. They had known each other for about six months.

On April 26, 2010, at about 11:00 a.m., Bang and his friend Paul walked by the parking lot of the Golden liquor store where appellant worked. Appellant approached and asked Bang if he was helping Paul in a dispute with appellant. Bang denied he was, and told appellant he was "trying to see fairness." Appellant asked Bang, "You want to fight, huh? You want to fight?" Appellant pulled out a belt and swung it at Bang. Appellant pursued Bang and Paul as they ran towards an alley.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise stated.

Later that afternoon, Bang and his friend David were across the street from the Golden liquor store. Bang was using the pay phone when appellant approached and asked if they were “trying to help Paul” and beat up or fight appellant together. Bang turned around and appellant punched him in the face with his fist. Bang ran away and called 9-1-1 from another pay phone. The police arrived and interviewed Bang. Bang declined to press charges.

Bang and two friends went to Shau May restaurant for dinner that evening. The restaurant was located near the Golden liquor store. While Bang was in the restroom he heard a loud commotion outside and came out to the dining area. Appellant was drunk and was yelling at Bang’s friends. When appellant saw Bang he challenged him to a fight and said “I’m gonna kick your ass.” Appellant asked Bang to go outside “and fight him one on one.” Bang replied, “You’ve already said that twice, this is the third time, so if you want to have a fight, let’s go for it.”

Appellant and Bang met in the Golden liquor parking lot and appellant adopted a fighting stance. Appellant, who was taller than Bang, punched him a few times, and kicked him once. Bang backed up a little and then blocked appellant’s next punch. Bang grabbed appellant by the neck and threw him to the ground. They continued to struggle until Bang got on top of appellant, grabbed and held his arm and punched him two or three times around the head and face. Appellant became very angry and yelled loudly. Bang thought appellant was about to cry, and took pity on him and released his grip. Appellant suddenly bit Bang’s ear and continued to do so for about 30 to 40 seconds. As Bang tried to stand up appellant continued to bite his ear. Bang cried out for help and felt that his ear was “gradually becoming detached.”

Ruben Suarez was in the Golden liquor parking lot at approximately 8:43 p.m. that evening. He saw appellant follow Bang into the parking lot and strike him three or four times before Bang put appellant in a headlock and took him to the ground. Suarez saw appellant bite down on Bang’s ear and heard Bang yelling for help. Appellant released his grip on Bang’s ear when a bystander intervened and pulled appellant away.

Appellant attempted to follow Bang who left the area and called 9-1-1. Blood was oozing out of Bang's ear. There was a three inch tear to the earlobe which was dangling and almost completely torn off. An ambulance transported Bang to Garfield Medical Center where a doctor reattached his earlobe. Bang suffered pain and numbness to his ear. He continued to have hearing impairment at the time of trial.

### **Defense Evidence**

Appellant testified on his own behalf. He claimed to have known Bang for about one year. Before Bang went to jail he asked appellant to take care of a backpack and bicycle for him. Appellant gave the belongings to somebody else and could not return them to Bang when he was released from jail. Bang threatened to kill appellant if he did not return the items to him. On the morning of April 26, 2010, Bang and three other men threatened appellant. Bang and appellant pushed each other but there was no fight. Later that afternoon, Bang and his friends threatened appellant once more but it did not develop into a "real fight."

That evening, appellant went to the restaurant to get change for the bus. He saw Bang's friends, Michael and Hung inside the restaurant. Appellant left the restaurant and Bang and his friends followed him outside to the Golden liquor parking lot. Bang put appellant in a headlock and he and his two friends wrestled appellant to the ground. Bang was on top of appellant and choked him. Bang punched appellant and grabbed his hair and banged his head against the ground. Appellant bit Bang's ear but released it when Bang released his hold of appellant's head.

Appellant denied he had been drinking that night. He testified that his speech was mumbled and incoherent because he was exhausted after the fight and he was in shock because he thought he was going to die. Appellant denied threatening Bang and denied starting the fight.

### **Rebuttal Evidence**

Detective Gabriel Escarsega of the Monterey Park Police Department interviewed appellant the day after the fight with Bang. Appellant did not tell Detective Escarsega

that Bang threatened to kill him if he did not return Bang's property. Appellant told Detective Escarsega that the fight was between him and Bang and he did not tell Detective Escarsega that Bang's friends got involved in the fight. Appellant denied that Bang choked him or banged his head against the ground.

## **DISCUSSION**

### **I. The Trial Court Did Not Abuse Its Discretion in Excluding Evidence That the Victim's Friends Threatened Appellant**

#### **A. Contention**

Appellant contends that the trial court erred by excluding evidence that Bang's friends threatened him moments before and during the fight with Bang. Appellant contends that the exclusion was prejudicial and deprived him of his constitutional right to present a defense. According to appellant, the proffered evidence was relevant and necessary to show appellant's state of mind as it related to his claim of self-defense.

#### **B. Standard of Review**

"[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including, . . . one that turns on the relevance of the evidence in question." (*People v. Waidla* (2000) 22 Cal.4th 690, 723.)

Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10.)

#### **C. Legal Principles**

Evidence Code section 350 states that only relevant evidence is admissible. "Relevant evidence' means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The trial court has discretion to exclude relevant evidence if "its probative value is substantially outweighed by the probability that its admission will

(a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352.)

A person claiming self-defense is required to “prove his own frame of mind,” and in so doing is “entitled to corroborate his testimony that he was in fear for his life by proving the reasonableness of such fear.” (*People v. Davis* (1965) 63 Cal.2d 648, 656.)

Evidence of threats “by members of a group who in the defendant’s mind are reasonably associated with the victim” have been found to be admissible. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1065 (*Minifie*)). But “a defendant’s evidence of self-defense is subject to all the normal evidentiary rules, including Evidence Code sections 350 [only relevant evidence is admissible] and 352.” (*In re Christian S.* (1994) 7 Cal.4th 768, 783.)

#### ***D. Proceedings Below***

Appellant testified that on the morning of April 26, Bang came to the liquor store and pushed appellant and threatened to kill him. He further testified that Bang and “three other men” threatened him. At a sidebar conference following the prosecutor’s objection on hearsay grounds, defense counsel argued the threats were relevant to show appellant’s state of mind as it related to his claim of self-defense. The court agreed and instructed the jury that the statements were “not being introduced for the truth” but were being introduced to show appellant’s state of mind.

Appellant testified that on the evening of April 26 at approximately 8:25 p.m., he met two of Bang’s friends in the Shau May restaurant and had a conversation with them. Appellant was asked what he did as a result of the conversation and testified that one of Bang’s friends hit him and said, “Oh, want to die today? Mr. Bang is here and—.” The court interrupted and struck the answer stating “The question was what did you do.” Appellant was then asked what Bang’s friends were doing and responded “They asked Mr. Bang to expedite me.” The court sustained the prosecutor’s objection on hearsay grounds and excused the jury.

At a sidebar conference, the court summarized the evidence as showing that appellant and Bang engaged in a fight subsequent to appellant's encounter with Bang's friends at the restaurant, that Bang testified that he knocked appellant down and hit him, and that appellant bit Bang's ear. The court stated that the testimony being elicited appeared to be "extraneous material" that did not seem to have "much relevance on the issues in the case." The court asked defense counsel for an offer of proof to show how the statements made by Bang's friends to appellant, outside of Bang's presence, could explain appellant's conduct later during the fight. Defense counsel stated that the testimony would show that Bang's friends accosted appellant.

The court was concerned with the amount of hearsay information that was being elicited, the need to rule on each objection that was raised, and the subsequent explanations and admonitions that the court was required to give to the jury. Defense counsel stated that he intended to show that Bang was the aggressor and that evidence that Bang's friends threatened appellant in the restaurant was relevant to appellant's state of mind. The court stated that going forward it was going to sustain objections to "everything that is said by someone else" because there had been no evidence linking Bang's friends to the fight later on in the parking lot and no evidence that they participated in the fight. Bang had testified earlier that appellant had threatened and assaulted him. The court would allow what Mr. Bang said but not "what other people said at another location, at another time."

The court explained that there had to be a nexus between what happened in the parking lot of the liquor store at approximately 8:45 p.m. and what happened in the earlier incidents and no such evidence had been presented. The court advised defense counsel to get to the incident to explain how appellant's state of mind was relevant. The court stated: "And then if you think it is relevant to get into the basis here his state of mind, why he thought these other people were going to attack him, why he thought his life was in danger, why he bit the ear, then I am okay with him explaining his thoughts. But I am not okay with going through hearsay all throughout the day. It may or may not

have any relevance to what happened later on. So that is the problem I am having. And I think it is very confusing for me to keep telling the jury that it is only coming in for this reason and for that reason and not for the truth. It is just way too much. Let's get to the incident and then he can explain why he thought the way he did and why he did the thing he supposedly did.”

Appellant resumed his testimony and defense counsel asked him if he could hear what Bang's friend said during the fight when he was on the ground and Bang was holding him down. The court sustained the prosecutor's hearsay objection to the statements made by Bang's friend during the fight. Appellant testified that he thought Bang was going to kill him because Bang was on top of him punching him and he was trying to “find ways to get away from him for the last time.” Appellant testified that he bit Bang's ear and “kept biting on it” until Bang released his hold on appellant's hair. There were no further questions by defense counsel relating to statements made by Bang's friends in the restaurant or during the fight.

#### ***E. Analysis***

In this case, the trial court found that the evidence concerning third-party threats was not sufficiently relevant at the time defense counsel sought to elicit the statements and we find no abuse of discretion.

As the court in *Minifie* emphasized, appellant's proffered evidence of self-defense was subject to the limitations of Evidence Code sections 350 and 352, meaning the evidence not only had to be relevant, but its probative value could not “necessitate undue consumption of time” or create substantial danger of “confusing the issues, or of misleading the jury.” (*Minifie, supra*, 13 Cal.4th at p. 1069.)

Evidence of the earlier encounters on April 26, between appellant and Bang was introduced by appellant and the court permitted hearsay testimony related to statements made by Bang's friends during the first incident and statements made by the police officers investigating the second incident. But the series of hearsay statements were confusing and time consuming and the court was properly concerned that the jury was

exposed to “a lot of extraneous material” that did not seem to have “much relevance on the issues in the case” but which required the court to repeatedly instruct the jury.

Appellant testified that on the night of the fight he had a conversation with Bang’s friends before he saw Bang, but left the restaurant as soon as he saw him. The court properly excluded the contents of that conversation and sustained hearsay objections to other third-party statements because at that time no evidence implicating anyone other than the victim in the fight had been introduced. Admitting the threats that Bang’s friends made at the restaurant at that point in the testimony was apt to confuse the jury and necessitate an undue consumption of time in instructing the jury as to their relevance in the case.

Contrary to appellant’s contention the trial court did not order defense counsel to instruct appellant not to testify about third-party threats and the court’s ruling did not prohibit counsel from eliciting testimony on how the threats bore upon appellant’s state of mind. The court’s ruling left open the possibility that defense counsel could revisit the issue. The court advised defense counsel to “get to the incident” and informed her that appellant could explain his thoughts on “why he thought [Bang’s friends] were going to attack him, why he thought his life was in danger” and “why he bit the ear” after establishing the requisite nexus between the threats and the subsequent fight.

Even if we agreed with appellant and found that the trial court erred by excluding evidence of third-party threats before and during the fight with Bang, we nonetheless would conclude that error was harmless under *People v. Watson* (1956) 46 Cal.2d 818. Under *Watson*, appellant has the burden on appeal to show that it is reasonably probable he would have obtained a more favorable verdict had the trial court not erred. (*Id.* at p. 836.) Contrary to appellant’s argument, mere evidentiary error, like other trial error, generally is *not* subject to the more stringent standard of prejudice (i.e., harmless beyond a reasonable doubt) for federal constitutional error under *Chapman v. California* (1967) 386 U.S. 18. Although the *Chapman* standard presumably would apply when a trial court completely excludes all evidence in support of a defendant’s defense (see *People v. Fudge* (1994) 7 Cal.4th 1075, 1103–1104), the *Chapman* standard does not apply in this

case because the trial court admitted evidence in support of appellant's claim of self-defense. (*People v. Fudge, supra*, at p. 1103 [“If the trial court misstepped, ‘[t]he trial court’s ruling was an error of law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense’”].)

Evidence of the later threats at the restaurant and during the fight would have added little to the testimony that the jury did hear. Appellant testified regarding the threats made by Bang and his friends earlier in the day. Appellant also testified that “the other two people” and Bang wrestled him to the ground, and that Bang’s two friends pushed him down during the fight. Moreover, the evidence against appellant was strong, and appellant’s testimony lacked credibility. Bang’s testimony that appellant was the aggressor, initiated the attack, and that he and appellant were the only two combatants in the fight was corroborated by a neutral bystander. Appellant’s version of the incident at trial was vastly different from the version he gave to Detective Escarsega the day after the fight with Bang. The proffered evidence would not have sufficed to overcome the jury’s conclusion that appellant was the aggressor in his confrontation with Bang on the evening of April 26, 2010.

The People argue that appellant failed to object that he was denied his constitutional right to present a complete defense at any point below, and that “appellant has forfeited this claim on appeal.” It is well established that even when a party has forfeited a right to appellate review by failing to preserve a claim in the trial court, an appellate court may still review the claim as an exercise of its discretion. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6; *People v. Johnson* (2004) 119 Cal.App.4th 976, 984 [“‘[T]he fact that a party, by failing to raise an issue below, may forfeit the right to raise the issue on appeal does not mean that an appellate court is precluded from considering the issue,’” *italics omitted*].) This is especially true where forfeiture may lead to a subsequent filing of a petition for a writ of habeas corpus asserting ineffective assistance of counsel based on trial counsel’s failure to preserve the issue. (*People v. Crittenden* (1994) 9 Cal.4th 83, 160, fn. 18.) Even if the forfeiture rule applies here, we

would, in the exercise of our discretion and as we have done here, address appellant's claim on the merits.

## **II. The Trial Court Properly Instructed the Jury on the Applicable Law**

Appellant contends that the trial court committed reversible error by failing to instruct the jury that they could consider past threats by Bang and his friends when evaluating appellant's self-defense claim. Appellant reasons that he presented substantial evidence that he acted out of fear and that his fear was reasonable based on the threats that Bang and his friends made against him and, therefore the trial court had a sua sponte duty to give a pinpoint instruction consisting of a portion of CALCRIM No. 3470 dealing with prior threats.

The trial court has no sua sponte duty to give such an instruction and must do so only if a timely request is interposed in the trial court. No such request was made here. Hence, the trial court did not err in failing to instruct on antecedent threats.

The trial court prepared and gave the parties a proposed packet of instructions which included self-defense instructions based on CALCRIM Nos. 3470, 3471, 3472, and 3474. The version of CALCRIM No. 3470 included in the proposed instructions did not contain language that the jury may consider past threats. Both sides reviewed the instructions and appellant did not request the additional admonition, and it was omitted without comment by anyone. Defense counsel responded affirmatively to the court's specific inquiry whether, in counsel's opinion, all self-defense instructions were included.

In criminal cases, “““even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.” [Citation.]” (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) This duty to instruct, sua sponte, on general principles closely and openly connected with the facts also encompasses an obligation to instruct on defenses that are

supported by the evidence and “that are not inconsistent with the defendant’s theory of the case.” (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047; see also *People v. Breverman*, *supra*, at p. 157.)

But the sua sponte duty to instruct on general principles of law does not extend to “pinpoint” instructions. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.) “Such instructions relate particular facts to a legal issue in the case or ‘pinpoint’ the crux of a defendant’s case, such as mistaken identification or alibi. [Citation.] They are required to be given upon request when there is evidence supportive of the theory, but they are not required to be given sua sponte.” (*Ibid.*)

This issue has been decisively addressed in *People v. Garvin* (2003) 110 Cal.App.4th 484, 488–490 (*Garvin*), holding there is no sua sponte duty by the trial court to give a pinpoint instruction on antecedent threats. As stated in *Garvin*, “[While] [t]he trial court was obligated to instruct on the basic principles of self-defense[,] [i]t satisfied this duty by giving the standard CALJIC instructions on this topic. These instructions are legally correct and the concept of antecedent assaults [or threats] is fully consistent with the general principles that are expressed therein. [Citation.] The issue of the effect of antecedent assaults against defendant on the reasonableness of defendant’s timing and degree of force highlights a particular aspect of this defense and relates it to a particular piece of evidence. An instruction on the topic of antecedent assaults is analogous to a clarifying instruction. It is axiomatic that ‘[a] defendant who believes that an instruction requires clarification must request it.’ [Citation.] Therefore, we conclude that this is a specific point and is not a general principle of law; the trial court was not obligated to instruct on this issue absent request.” (*Id.* at p. 489.)

We agree with *Garvin* and find it applicable here. (See Bench Note to CALCRIM No. 3470 (2012 ed.) [*On defense request* and when supported by sufficient evidence, the court must instruct that the jury may consider the effect of “antecedent threats and assaults against the defendant on the reasonableness of defendant’s conduct,” citing *People v. Garvin*, *supra*, 110 Cal.App.4th at p. 488].)

Even if the trial court erred in failing to give an antecedent threat instruction, that error was harmless in that there is no reasonable probability that a more favorable verdict for appellant would have ensued had such an instruction been given. (See *People v. Earp* (1999) 20 Cal.4th 826, 887; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

The jury was properly instructed on self-defense. Specifically, the jury was instructed that self-defense is justified when the defendant “reasonably believed he was in imminent danger” and “reasonably believed that the immediate use of force was necessary to defend against that danger.” (CALCRIM No. 3470.) The jury was further instructed to “consider all the evidence that was received throughout the entire trial” (CALCRIM No. 220) which included threats made by Bang and his friends earlier in the day. These instructions were consistent with consideration of prior threats as a circumstance related to appellant’s claim of self-defense. (See *Garvin, supra*, 110 Cal.App.4th at p. 489.)

Defense counsel vigorously argued self-defense to the jury. Thus, even if the instruction was given, it is not reasonably probable that the jury would have reached a result more favorable to appellant.

### **III. Cumulative Error**

Appellant’s final contention is that cumulative error denied him his due process right to a fair trial. A defendant is entitled to a fair trial, not a perfect one. (See *People v. Chatman* (2006) 38 Cal.4th 344, 410; *People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Bradford* (1997) 14 Cal.4th 1005, 1057.) The constitutional rules governing the conduct of criminal trials exist to “ensure that those trials lead to fair and correct judgments.” (*People v. Avila* (1995) 35 Cal.App.4th 642, 656.) When a reviewing court can determine that the record developed at trial establishes guilt beyond a reasonable doubt, “the interest in fairness has been satisfied and the judgment should be affirmed.” (*Ibid.*) Here, as explained above, any complained-of errors either did not occur or were harmless. Appellant’s claim of cumulative error is rejected.

**DISPOSITION**

The judgment is affirmed.

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\_\_\_\_\_, Acting P. J.

DOI TODD

We concur:

\_\_\_\_\_, J.

ASHMANN-GERST

\_\_\_\_\_, J.

CHAVEZ